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In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

THE WHEELING & LAKE ERIE RAILWAY COMPANY
and
THE PENNSYLVANIA RAILROAD COMPANY,
Petitioners,

vs.

WILLIAM KEITH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit
and
BRIEF IN SUPPORT THEREOF.

The petitioners, The Wheeling & Lake Erie Railway Company and The Pennsylvania Railroad Company, pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above case on March 31, 1947 reversing the judgment of the United States District Court for the Northern District of Ohio, Eastern Division.

OPINIONS BELOW.

The memorandum opinion of the District Court (R. 99-101) is not reported. The opinion of the Circuit Court of Appeals (R. .....) is reported in 160 F. (2d) 654.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 31, 1947. Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended. 28 U. S. C. § 347(a).

STATUTE INVOLVED.

Section 1 of the Federal Employers Liability Act, as amended, is copied in the Appendix.

QUESTION PRESENTED.

Where, in an action under the Federal Employers Liability Act, it appears that respondent, a pilot-engineman employed by the Wheeling and Lake Erie Railroad Company and operating a Pennsylvania Railroad train over the tracks of the Wheeling, took his train from a place of safety on a sidetrack out onto the main line in admitted violation of a written order given to and understood by him where it crashed head-on into a train the passage of which respondent had been ordered to await, was the conduct of the Wheeling and Lake Erie pilot-conductor at the rear of respondent's train, who had mislaid his orders and was searching for them at the time of the collision, and who did not know or appreciate the respondent's peril, there being no evidence that there was time to have prevented the collision, a proximate cause of respondent's injury?

STATEMENT.

This case involves a suit by respondent to recover for injuries sustained when, in direct violation of orders which he had read and understood, he moved a Pennsylvania Company train from a siding onto a main line where the train collided with another Pennsylvania Company train, resulting in the death of three persons, the injury of several others including respondent, and the demolishment of three engines (R. 14, 39).

On the night of January 1, 1943, a train of The Pennsylvania Railroad Company was forced, due to flood conditions on its own tracks, to pass over the tracks of The Wheeling & Lake Erie Railway Company (R. 22). Because the Pennsylvania Company's employees were not familiar with the Wheeling tracks and rules (R. 22, 27) and in accordance with a standard form of agreement between the two railroads (Ex. 5), the Wheeling Company supplied a pilot engineer and conductor who were in sole charge of the train (R. 29, 37).

Proceeding west on the Wheeling tracks, the pilot engineer and conductor received Train Order 16 at Sherrodsville, Ohio (R. 29) which directed them to wait on a siding at New Cumberland, Ohio, until two eastbound trains had passed (Ex. 6, 6A). Respondent read the orders and repeated them to the fireman (R. 40). The pilot conductor also read the orders and then placed them on a desk in the caboose (R. 30).

At New Cumberland, the train moved to the siding (R. 30). When the flagman descended to throw the switch, the pilot conductor's orders blew onto the floor of the caboose and, although he searched for them in the strange caboose, he did not find them until after the collision (R. 30-31). The train remained on the siding for twenty or thirty minutes, during which time respondent worked about the engine and the pilot conductor apparently remained at the rear of the train (R. 35, 39).

After only one eastbound train had passed, and in direct violation of Train Order 16 which he did not check again, respondent moved the train from the siding to the main track (R. 31, 40, 52). When the train had cleared the switch, the switch was thrown by the flagman who signaled that the switch was thrown and boarded the train which had continued moving on the main track (R. 31, 33, 41). The train proceeded westward. The night was dark and it was raining or snowing (R. 29, 42). There was no means of

communication between the respondent in the engine and the pilot conductor in the caboose, although the latter could operate the brakes (R. 30).

After the flagman had boarded the caboose, he observed a light ahead which he called to the attention of the pilot conductor, who remarked that he thought two eastbound trains were to pass but was unable to find his orders to ascertain the fact (R. 32). The pilot conductor remarked that from that point it was possible to see a train on the siding at Valley Junction, about a mile ahead (R. 32). He did not stop the train (R. 32).

The train entered a cut (R. 18, 41). Respondent saw a light ahead of his train, about six or seven car lengths away (R. 41, 51). He applied the brakes, shouted a warning to the others in the cab, and stepped onto the gangway to jump from the engine (R. 41). A head-on collision followed. At the time of the collision, respondent estimated the speed of his train at "not over about—under twenty miles" and of the oncoming train at twenty-five miles per hour (R. 42, 47). No claim was made that the oncoming train was negligently operated (R. 2-3).

To recover for injuries sustained in the collision, respondent brought suit against petitioners in the United States District Court for the Northern District of Ohio. At the close of respondent's evidence, the District Court granted petitioners' separate motions for directed verdicts (R. 81). Respondent's motion for a new trial was overruled (R. 98), and respondent thereupon appealed to the United States Circuit Court of Appeals for the Sixth Circuit (R. 102-105). The Circuit Court of Appeals reversed the judgment of the District Court and remanded the case for a new trial (R. .....).

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the evidence was sufficient, if submitted to a jury, to sustain a finding of negligence on the part of the pilot conductor.

2. In holding that the conduct of the pilot conductor was a proximate cause of the collision.

3. In holding, in the absence of any evidence that the pilot conductor knew of the peril, appreciated the peril and had sufficient time to prevent the accident, that his conduct was a proximate cause of the collision.

4. In holding that negligence of an employee of The Wheeling & Lake Erie Railway Company requires a reversal of a judgment for The Pennsylvania Railroad Company.

5. In not holding that respondent's admitted negligence was the sole cause of his injuries.

6. In reversing the judgment of the District Court.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED.

1. The decision of the Circuit Court of Appeals is in probable conflict with the decisions of this Court in *St. Louis, Southwestern Railway Co. v. Simpson,* 286 U. S. 346 and *Southern Railway Co. v. Youngblood,* 286 U. S. 313.

2. The decision of the Circuit Court of Appeals is in direct conflict with the decision of the Court of Civil Appeals of Texas in *Hunter v. Texas Electric Railway Co.,* 194 S. W. (2nd) 281, certiorari granted, October term, 1946, No. 893, March 31, 1947.

3. The decision of the Circuit Court of Appeals misapplied the decision of this Court in *Tiller v. Atlantic Coast Line Railway Co.,* 318 U. S. 54.

4. The decision of the Circuit Court of Appeals misconstrued Section 1 of the Federal Employers Liability Act, as amended.

ARGUMENT.

The opinion of the Circuit Court of Appeals is based upon its own resume of the evidence which, it finds, is sufficient to sustain a jury verdict against the railroad because of the conduct of Bush, the pilot-conductor, in failing to act after the respondent had alrady moved his train on to the main track. In reaching this conclusion, the court rejects the finding of the trial judge who heard the case, Judge Wilkin, who held that the evidence conclusively showed that the sole proximate cause of the accident was the conduct of respondent himself.

Cases under the Federal Employers Liability Act have developed a special field of tort law. The determination of what constitutes negligence and what constitutes the causal relationship of that negligence to the complained of injury in such cases is a federal question controlled by federal decisions. *Tiller v. Atlantic Coast Line Ry. Co.*, 318 U. S. 54 at 65. Likewise, this Court has described the circumstances in which a trial court may direct a verdict in a Federal Employers Liability Act case. *Brady v. Southern Railway Company*, 320 U. S. 476 at 479. More recently, it has examined the tort doctrine of *res ipsa loquitur* and announced the rule for its application in Federal Employers Liability Act cases. *Jesionowski v. B. & M. Railroad Co.*, 329 U. S. 452 at 457. In its most recent published opinion this Court has rejected the sometime asserted belief that since the 1939 amendment to the Act (45 U. S. C. 51 *et seq.*) it has become a compensation rather than a negligence statute. *Myers v. Reading Co.*, decided June 2, 1947, ... U. S. ..... This Court has repeatedly declared that it is incumbent upon a plaintiff to prove not only that the defendant railroad was negligent but that

such negligence was the proximate cause, in whole or in part, of the plaintiff's injury. *Tenant v. Peoria & P. U. Railway Co.*, 321 U. S. 29, at 32; *Brady v. Southern Railway Co., supra*, 479, 484; *Tiller v. Atlantic Coast Line Ry. Co., supra*, concurring opinion at p. 71; *Ellis v. Union Pac. Ry. Co.*, 329 U. S. 649 at 653.

Negligence alone or in the abstract, not causally connected with the injury for which recovery is sought, is not actionable under the Federal Employers Liability Act, or elsewhere. In this case the conduct of the pilot-conductor, taken in the light most favorable to respondent, had no causal connection with the injury to respondent. The behavior of the pilot-conductor which the Circuit Court of Appeals thought significant was his inaction after the respondent had already moved the train on its way to destruction. Uncertain as to whether or not the respondent engineer had made a mistake, the pilot-conductor began searching for the wind-blown orders. He was still searching when the accident took place a very short time later. He could not communicate with respondent, and in any event there is nothing in the record to show that stopping the train could or would have averted the collision. The Circuit Court of Appeals does not show how his conduct was causally related to the respondent's injury.

In a 1932 case under the Act whose facts are amazingly parallel to the facts of the case at bar, this Court considered the effect of a conductor's failure to take immediate action to correct an engineer's mistake. That case, *St. Louis Southwestern Ry. Co. v. Simpson*, 286 U. S. 346, adopted the well-tested rule that a person's conduct is not causally related to another's injury where that other has placed himself in a dangerous position, if the first person, though he may himself be negligent, has not actually perceived and understood the other's danger at a time sufficiently prior thereto to enable him to act upon it and save

the other. If he has perceived and understood the other's danger and thereafter neglects to act though time permits, his negligence is then deemed causally related to the injury and actionable. In short, the negligence must be related to the injury, it must cause the injury "in whole or in part." Being unable to state this causal relationship, the Circuit Court of Appeals outlines what it considers to be the pilot-conductor's negligence and ignores the bald fact that this had nothing to do with respondent's injury. To require an employee to prevent another employee from injuring himself when the first has no conscious knowledge of or appreciation of the perilous situation being created by the latter, and when there is no showing that there was sufficient time to have prevented it, imposes on the former a duty impossible of performance.

The opinion of the Circuit Court of Appeals is in conflict with this Court's opinion in *Southern Railway v. Youngblood,* 286 U. S. 313, another head-on collision case where it was held that when the *sole efficient cause* of the employee's death was the conduct of the employee himself, then the possible negligence of other railroad employees not causally connected with the first employee's negligence is not a ground for recovery. Negligence in a vacuum is not actionable and it is difficult to see how the 1939 Amendment to the Federal Employers Liability Act provides that it is.

The opinion of the Circuit Court of Appeals is likewise in conflict with that of the Court of Civil Appeals of Texas in *Hunter v. Texas Electric Railway Co.,* 194 S. W. (2nd) 281, in which certiorari has been granted and which is now awaiting argument.

The questions raised by this case are matters of great general interest and involve the construction of a federal statute. The opinion of the Circuit Court of Appeals is in conflict with opinions of this Court and the Court of Civil Appeals of the State of Texas. If the tort law principle that

a causal connection between a plaintiff's injury and a defendant's negligence is a *sine qua non* of plaintiff's recovery is no longer the law in Federal Employers Liability Act cases, such should be established by this Court and not by implication from the Circuit Court of Appeals decision.

CONCLUSION.

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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SQUIRE, SANDERS & DEMPSEY,
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APPENDIX.

Federal Employers Liability Act (45 U. S. C. 51).

Section 1.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.